# Nos. 12,327 and 12,328

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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PACIFIC PORTLAND CEMENT COMPANY
(a corporation),
*Appellant,*

vs.

THE WESTERN PACIFIC RAILROAD COMPANY
(a corporation),
*Appellee.*

## APPELLEE'S PETITION FOR A REHEARING.

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## APPELLEE'S PETITION FOR A REHEARING.

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*To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:*

The Western Pacific Railroad Company, Appellee in the above-entitled cases, hereby petitions for rehearing in connection with the Opinion and Judgments rendered by this Court on August 25, 1950, and as grounds for such petition alleges that:

I.

The Court erred in holding that the occurrence of an appropriation as such word is used in the de-

murrage tariffs rests upon the intentions and understandings of the parties.

II.

The Court erred in holding that the presumption of lawful conduct coupled with the fact that no demurrage was charged on the cars involved requires the Court to presume that the parties understood and intended that such cars not be considered appropriated when taken from Appellee's tracks.

III.

The Court erred in disregarding the findings of the trial Court which were not "clearly erroneous" and in treating these appeals as though they were a trial *de novo* and, after such treatment, finding that the cars involved were taken and held by Appellant for the benefit of Appellee and subject to Appellee's control.

IV.

The Court erred in holding that it would be inequitable to hold Appellant liable for the demurrage charges sought and that, if the tariffs were applicable, then such tariffs were of questionable validity.

Dated, San Francisco, California,
September 22, 1950.

Respectfully submitted,
C. W. Dooling,
E. L. Van Dellen,
*Attorneys for Appellee*
*and Petitioner.*

## Certificate of Counsel

I hereby certify that in my judgment the above Petition For Rehearing is well founded and is not interposed for delay.

Dated, San Francisco, California,
September 22, 1950.

E. L. Van Dellen,
*Attorney for Appellee*
*and Petitioner.*

## ARGUMENT IN SUPPORT OF PETITION.

### I.

**THE COURT ERRED IN HOLDING THAT THE OCCURRENCE OF AN APPROPRIATION AS SUCH WORD IS USED IN THE DEMURRAGE TARIFFS RESTS UPON THE INTENTIONS AND UNDERSTANDINGS OF THE PARTIES.**

The basic premise upon which this Court rested its decision is that the time when the cars involved were appropriated, as that word is used in the demurrage tariffs, depends upon the intentions and understandings of the parties. While such an approach to the problem might be proper in the usual type of case it does violence to the well-established rules applicable to tariff problems.

The underlying philosophy of the Interstate Commerce Act and related statutes is that all patrons of a common carrier shall be placed on an equal footing. To accomplish this purpose the law requires that all services, privileges, facilities, etc., shall be covered by tariff publications, having the force and effect of law, which shall be uniform in operation and application. This purpose cannot be accomplished by tariff publications if it is possible to vary the interpretation of such tariff provisions between a particular shipper and a particular railroad by agreements, understandings, and intentions. Tariff provisions must be uniformly applied with no possibility of variation in application based on subjective matters such as understandings and intentions. This rule was well stated in the recent case of *Empire Box Corp. v. D. L. & W. R. Co.,* 171 F. 2d 389, where the Court, after pointing out that there must be "rigid adherence to the letter" of the demurrage tariffs, stated (p. 391):

> "The regulations which govern the transactions of a great railroad—infinite in number and diversity as they are—demand speedy and certain application in practice, if the work is to go on as it should. Their incidence will often be harsh and unjust, and yet that may not be too high a price for smooth operation. The cost and delay in working out justice in the relatively few instances where their literal enforcement works injustice, may in the end involve more loss than gain."

Tariff provisions must be certain in their application. To paraphrase the language of the Interstate Commerce Commission in the leading case of *Chrysler Corporation v. N. Y. C. R. Co.*, 234 I.C.C. 755 at 758, "to superimpose upon the demurrage provisions the necessity of considering the possible existence of" individual intentions and understandings, "would endanger the integrity of the rules and open them to possible abuse." The basic approach to the problem adopted by this Court will create chaos in the railroad industry and leave the way open for great abuse in the application of the demurrage rules to the many many large industrial concerns having plant railroads*. Under this Court's decision a railroad

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*The Court apparently believes that the situation at Gerlach whereby Appellant used its own power to haul cars to the plant at Empire was unusual and existed "Because the private tracks of appellant would not sustain a regular freight locomotive". Not only is there no evidence supporting the quoted language, but it is the exception rather than the rule for a railroad to do such switching on the tracks of a plant railroad. Not only do most large industrial plants do their own switching, as Appellant did at Gerlach, but also interchange tracks generally are supplied by such plants, not by the railroad. See the report of the Interstate Commerce Commission in *Ex Parte 104, Part II, Terminal Services*, 209 I.C.C. 11, and the multitude of supplemental reports in such proceeding.

station agent or other employe readily can avoid the application of demurrage merely by stating that the industry would be doing the railroad a favor if it would hold cars, intended for ultimate use by the industry, on such industry's tracks. Plants located far from supervision by officials of the railroad would gain a decided advantage and tariffs would be uncertain in application depending on what arrangements in derogation of the tariffs the local agent was willing or happened, to make. Additionally, whether such arrangements would be held to violate the tariffs or be perfectly proper might well depend on the happenstance of the wording of any letters written or statements made. For example, assume the only facts before this Court were that the Appellant with its own engine removed cars from Appellee's yard and hauled them to Empire where they were ultimately loaded and returned to Appellee together with billing instructions. In the absence of any further evidence could this Court hold that the appropriation rule did not apply and demurrage did not accrue for any period in excess of the free time computed from the time the cars were removed from Appellee's yard? Suppose, however, that an agent of the Appellee erroneously began computing demurrage from the time the industry began loading rather than from the time of appropriation and that this practice continued for many years. Would the fact that such agent and the plant's employees misunderstood the requirements of the tariff (and thus "intended and understood" that demurrage would not be assessed until such later time) in any way change the situation? Or suppose the railroad agent expressly agreed with the plant man-

ager that the demurrage records would be maintained to show the cars ordered and placed when loading began rather than when removed from Appellee's tracks, could it be contended that such express agreement not to charge demurrage (although the parties intended and understood that no demurrage would be assessed) made inapplicable the demurrage which would be applicable but for such agreement? Now, however, by the fortuitous circumstance that the agent might have made statements, or letters might have been written, suggesting an advantage to the railroad, the whole picture is different!! Under this Court's decision such statements estop the railroad from claiming that the cars were held for loading and thus subject to demurrage.

If the policy of the law is to be carried out, it just cannot be that the question of whether or not cars taken by a plant railroad onto its private tracks and held until loaded are subject to demurrage is to turn on the understandings and intentions of the parties as shown by occasional conversations on the station agent level. Any such understandings and intentions to be given effect must be contained in the tariffs. If any unusual situations exist which make desirable or necessary an exception to the tariff the proper procedure is a published exception to the tariff. Local understandings between station agents and plant employees cannot and must not be allowed to make such exceptions. The very tariff involved herein points out the proper procedure and makes an exception to the general rules under facts very similar to those at Gerlach. See Item No. 445 (Exhibit No. 1, Tariff 4-X, p. 38). This Item, applicable

on certain eastern railroads, covers the situation where an industry removes cars from interchange tracks by its own power and sets them out on storage tracks of the industry. In this situation on the specified railroads the express tariff exception provides that the time of appropriation shall be the time when the cars are removed from the industry's storage tracks rather than when removed from the interchange tracks as would be the case but for such express exception. Appellant in its various briefs through these cases (see, for example, Reply Brief p. 12) has insisted on misstating what this exception covers and keeps referring to the "fact" that such exception covers cars "pushed by the carrier on industry's tracks for the carrier's convenience". A reading of the exception shows such contention to be wrong —the exception was necessary because the cars were taken by the industry with its own power from interchange tracks and "set off by such industry's power on a designated track or tracks until required". The very fact that an exception was considered necessary in this situation shows that the tariff was considered applicable from the time the industry took the cars from the interchange tracks—just as it is applicable from the time Appellant took the cars from Appellee's tracks at Gerlach in the absence of a contrary "intention and understanding" *set forth in the tariff*.

The question of demurrage charges is not a question merely between an individual railroad and an individual shipper. As was pointed out in *Iversen v. United States*, 63 F. Supp. 1001 (affirmed 327 U.S. 767) such charges are not carrier charges or penalties but are "an integral

part of the established rules and regulations relating to the use and movement of cars". The use and movement of freight cars is a matter of nationwide concern (see the various I.C.C. Service Orders in effect during the periods involved in these actions; for example, Revised Service Order No. 242, Exhibit No. 1, Tariff 4-X, Supplement No. 26). If the "intentions and understandings" of a local agent in Gerlach, Nevada, can make uncertain in application that which must, under the policy of the law, be certain in application, the same thing can be done by hundreds of local agents throughout the nation and the movement and supply of cars hindered to the damage of shippers and receivers of freight generally. If any exceptions are to be made they must be published in the demurrage tariffs where they are subject to scrutiny and control by the Interstate Commerce Commission which can suspend their effect and require that they be justified if it appears that the general public interest may be jeopardized.

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## II.

**THE COURT ERRED IN HOLDING THAT THE PRESUMPTION OF LAWFUL CONDUCT COUPLED WITH THE FACT THAT NO DEMURRAGE WAS CHARGED ON THE CARS INVOLVED REQUIRES THE COURT TO PRESUME THAT THE PARTIES UNDERSTOOD AND INTENDED THAT SUCH CARS NOT BE CONSIDERED APPROPRIATED WHEN TAKEN FROM APPELLEE'S TRACKS.**

In its Opinion this Court has given great, if not controlling, weight to a presumption of lawful conduct, holding that as Appellee over the years did not assess

demurrage computed from the time Appellant removed the cars from Appellee's tracks it must be presumed that the parties intended that no appropriation take place at the time cars were so removed, for otherwise a violation of the Elkins Act would have occurred.

It is difficult to see how such presumption can have any bearing in this case for before the Court can apply such presumption it must pick and choose which part of the law it wants to presume was not violated. In its Opinion the Court chose to presume that the parties were not violating that portion of the Elkins Act which made it unlawful to fail to collect applicable tariff charges. But the minute it is held that no tariff charges are due on the cars involved but that such cars were stored on Appellant's tracks for the convenience of the railroad until needed by Appellant, such finding runs afoul of that part of the Elkins Act which forbids the giving and receiving of concessions. Failure to collect applicable tariff charges is not the only matter covered by the Elkins Act. (See *United States v. Michigan Portland Cement Co.*, 270 U.S. 521.) It is clear that the placing and holding of a large supply of cars near Appellant's plant, with Appellant having the right to take such cars when and as needed, is an unlawful advantage not given to shippers generally and hence a violation of the law. See *61st Annual Report of the Interstate Commerce Commission* where it is said of such a situation (p. 76):

> "One investigation of the practices of a carrier and shipper disclosed that an unlawful advantage was given by the carrier, and solicited and accepted by the shipper, through the placing and holding of

> empty freight cars on the tracks of the carrier in close proximity to the plant of the shipper without charge and without tariff authority therefor. Prosecutions were instituted against both carrier and shipper. Upon pleas of *nolo contendere* each was fined $12,000."

In any event, what this Court has done is to take the presumption of lawful conduct and use it in weighing the evidence to arrive at an inference. In other words, the Court has based an inference on a presumption and this, of course, is not proper. A presumption stands in the absence of any evidence on the subject but when evidence as to the factual situation is introduced "the presumption disappears from the case and the evidence is to be weighed without regard to the presumption". (*British America Assurance Co. v. Bowen,* C.C.A. 10, 134 F. 2d 256, 259; *Wigmore on Evidence,* 3d Ed., Vol. 9, Section 2491, pp. 289, 290.) The facts of record in this case must be judged on their merits and the reasonable inferences to be drawn therefrom reached without regard to the presumption of lawful conduct. Under the approach used by this Court of determining "at the outset" that there was no appropriation because of the presumption of lawful conduct the whole case has been decided on the basis of such presumption.* The problem of "intentions" of the

*Having first held that whether or not an appropriation took place depended on the "intentions and understandings" of the parties the inevitable result of "at the outset" holding that there was a presumption that the parties "understood and intended" that the cars be not considered appropriated when taken from Appellant's tracks is to decide the case wholly on such presumption and not to weigh the facts "without regard to the presumption".

parties of necessity must always be an inference from the facts and thus under this Court's approach the presumption of lawful conduct would always prevail. The only way such presumption might possibly be overcome would be to show by the record of a criminal conviction that the parties were guilty of violating the law. If this Court's approach on the matter of the presumption of lawful conduct is to stand, then the Court should take judicial notice of official reports of the Interstate Commerce Commission (*Terminal R. Assn. of St. Louis v. Kimbrel,* C.C.A. 8, 105 F. 2d 262, 263, 264) wherein it is shown (*61st Annual Report of the Interstate Commerce Commission,* pp. 77, 155) that Appellee was convicted in the U. S. District Court, District of Nevada, on an information charging the granting of concessions by the improper assessment of demurrage charges and on an information charging falsification of demurrage records in connection with the practice involved in the present actions and where it is also shown (*62d Annual Report of the Interstate Commerce Commission,* pp. 81, 140) that Appellant was convicted in the same Court on an information charging the soliciting and accepting of concessions in failing to pay applicable demurrage charges in connection with the very situation involved in the present actions. While pleas of *nolo contendere* do not constitute an admission against interest yet the *fact* of conviction, whether based on such a plea or on a plea of guilty or after trial, certainly is relevant in overcoming a presumption of innocent conduct if the approach taken by this Court is proper.

## III.

**THE COURT ERRED IN DISREGARDING THE FINDINGS OF THE TRIAL COURT WHICH WERE NOT "CLEARLY ERRONEOUS" AND TREATING THESE APPEALS AS THOUGH THEY WERE A TRIAL DE NOVO AND, AFTER SUCH TREATMENT, FINDING THAT THE CARS INVOLVED WERE TAKEN AND HELD BY APPELLANT FOR THE BENEFIT OF APPELLEE AND SUBJECT TO APPELLEE'S CONTROL.**

Having already decided the case under the presumption argument discussed above, the Court in its Opinion proceeds to the main question upon which the case was tried and decided in the lower Court and comes up with a resultant finding of fact contrary to that of the trial Judge who heard and saw the witnesses. In effect this Court has treated these cases as though Appellant was entitled to a trial *de novo* before it and has failed to give any effect to the findings of the trial Court as is required by Rule 52, Federal Rules of Civil Procedure. Before such findings can be set aside they must be found to be "clearly erroneous" and no such finding is justified. This Court states that "The conversations between the station agents, the practice of Appellee in not computing demurrage until the cars were spotted for loading, the letters written by Appellee's officers after the question was raised by the demurrage bureau" sustain an "inference" that "both parties regarded the cars stored on appellant's tracks as being held *for the benefit of appellee and subject to appellee's control*" and that any benefit to Appellant was an incidental benefit. Such inference is directly contrary to the findings of the trial Court that the cars were taken to Empire for the benefit of the Appellant. See the trial Court's statement (R. 335):

> "There was, in my opinion as I got the evidence in the case, a situation which was just as much for the benefit of the defendant, to have these cars there, as it was for the plaintiff, even though the plaintiff got some benefit from that."

While Judge Goodman found as a fact that the taking was for the Appellant's benefit with an incidental benefit to Appellee, this Court has just reversed the situation without the witnesses before it and has held that the real benefit was to Appellee and the incidental benefit to Appellant. Judge Goodman, with the witnesses before him, took a realistic view of the situation while this Court appears to make a very academic and naive approach. Appellant's contentions, which this Court has accepted, are so unrealistic as to be incredible. Under such contention we are to believe that out of the goodness of its heart a large industry engaged in business for profit, not only without payment or consideration of any kind but actually at considerable inconvenience and expense, furnished storage space for Appellee's cars, performed switching of such cars to and from the loading points, and (as the Court holds that the cars at Empire were subject to Appellee's control) was willing to haul such cars back and forth between Gerlach and Empire whenever desired by Appellee.

The Court's unrealistic findings are based on the proposition that Appellee was benefited because congestion in its yard at Gerlach was relieved. Under this argument demurrage could never be due under the appropriation rule for the same thing can be said of any private spur or plant railroad tracks. See *Granger v. Davis,* 2 F. 2d 695, where in a demurrage case the Court said (p. 697):

> "It is clearly a private yard and not a general railroad facility * * *. That it facilitates the handling of freight, relieves the general yards and is advantageous to the railroad is beside the mark. The same is true in a greater or lesser degree of every private industry switch."

In its Briefs Appellant has argued that this Court may, in effect, treat these appeals as a trial *de novo* because much of the evidence consisted of letters, depositions and admissions and thus the reason for the requirement of Rule 52, Federal Rules of Civil Procedure, is not present. But the primary basis of Appellant's contention in these cases was the oral testimony of Mr. Nottingham. Clearly this Court is in no position to substitute its judgment for that of Judge Goodman in passing upon the weight, or lack of weight, to be given to such testimony. So, too, in large measure the opinions and conclusions stated in the letters relied on by this Court were at variance with the testimony of Mr. Howell (R. 247 et seq.), who, it should be noted, was physically present at Gerlach several days a week during the period involved (R. 248) and not merely twice during the whole period as was Mr. Foster (R. 181) whose deposition was read and who wrote one of the letters relied upon by Appellant. Additionally, there is absolutely no evidence that the writers of the other letters were ever at Gerlach and familiar with the situation at such point. The trial Court was in a far better position than is this Court to compare and judge the testimony of Mr. Howell and weigh the letters in the light of such testimony. In view of such oral testimony it is not proper for this Court on appeal to treat the case as a trial *de novo* and disregard the findings of the trial court.

But even treating this matter as a trial *de novo* the holding of this Court is erroneous, for the only possible inference from all the evidence is that the cars involved were held at Empire for just one reason—to be loaded with Appellant's freight. At the outset it would seem that if the only evidence was that Appellant with its own power removed cars from Appellee's tracks and held them on its tracks at Empire until they were loaded the only possible result would be that demurrage was applicable computed from the time of such removal. What evidence has been relied upon to change this result? This Court refers to three different types of evidence: the conversations between the Appellee's station agents and Appellant's plant superintendent, the fact that the demurrage records kept by the agents didn't assess any demurrage, and letters written after the failure to assess demurrage was questioned. Undoubtedly the latter two were referred to merely as being confirmatory of the agreement and arrangement which is supposed (and the word is used advisedly for the result drawn from this testimony is pure supposition) to have been proven by the vague and general testimony of the plant superintendent (R. 135 et seq.). What was the agreement and arrangement? Did the agent specify certain cars which it was requested that Appellant store for Appellee? The Court apparently holds that all cars taken to Empire were covered by the agreement and arrangement. But the record does not support any such holding. An example of one of the so-called "car orders" (which in fact are not car orders requesting that something be done in the future but are recordings of something already done) is in evidence (R. 48) and covers thirteen cars of which only two came from the

"storage tracks" at Empire, the other eleven moving directly from Appellee's Gerlach yard to the loading points. Clearly these eleven cars were appropriated for loading at the time removed from the Gerlach yard and yet Appellant's "car order" treats them as being covered by the agreement and arrangement and specifies that the time for demurrage to begin shall be the day following such appropriation. As the agreement and arrangement was to relieve congestion in Appellee's rail lines at Gerlach was it to apply when no such congestion existed? It is common knowledge that during the depression years there was not enough business on the railroads (and particularly on Appellee's rail lines which went into receivership in 1935 (R. 123)) to create congestion of any kind. Yet according to Appellant's argument and the Court's holding this agreement and understanding was carried on during the entire period subsequent to 1926, including periods when there could not possibly have been any congestion. The plant superintendent admitted (R. 141) that "I don't remember just how it was"—and that's just the condition of Appellant's argument and contention. Neither the testimony of Nottingham nor any other testimony or evidence shows what cars Appellant was requested to store for Appellee. In fact, the evidence as a whole discloses that Appellant came onto Appellee's tracks and took whatever cars it desired—the selection was made by Appellant and Appellee did not know and could not know which cars Appellant "intended" to move directly to the loading platforms and which it "intended" at the time of taking to hold on its storage tracks. The whole situation was within the control of Appellant and it took and held such cars as suited its convenience and no others.

The Court's holding is based on the proposition that the storage on Appellant's tracks was for Appellee's benefit because it relieved congestion on Appellee's tracks. The Exhibits attached to each of the Complaints show that Appellant's storage tracks (exclusive of the loading tracks) would hold at least 45 cars, but such Exhibits also show that the daily average number of cars held by Appellant (exclusive of those on the loading tracks) during the period involved in these suits was approximately 20. How much congestion would 20 cars relieve when we are discussing railroad trackage with a capacity of nearly 400 cars? If the agreement was, as held by this Court, that the storage tracks should be, in effect, a railroad facility and the cars there subject to Appellee's control, why didn't Appellant make a real effort to relieve congestion by utilizing the whole capacity of such storage tracks? It is a significant coincidence that the average number of cars stored almost exactly equals one day's loading requirements of the Appellant. This inevitably leads to the conclusion that witness Howell was correct when he stated (Exhibit D, R. 286) that the Appellant did "not keep more cars at the plant than *they need to protect them against the failure of their engine* or other causes". The storage on Appellant's tracks was to protect Appellant's needs—not to relieve congestion on Appellee's tracks.

The fact that no demurrage was charged of necessity can be given no effect in determining whether the demurrage tariffs were applicable nor in determining whether the taking of the cars by Appellant was for the benefit of Appellant or of Appellee. In effect all the Court is holding here is that the cars must have been held

for Appellee's benefit for otherwise a charge would have been made for allowing Appellant to have them. But conversely it is just as logical to argue that the Appellant must have taken and held such cars for its own benefit for otherwise it would have required Appellee to pay a track rental charge for the use of Appellant's storage tracks and for the services rendered in moving the cars to and from such storage tracks.

Not only does this Court find that the cars were taken and held by Appellant for the benefit of Appellee but even goes so far as to make the unsupported assertion that such cars on Appellant's tracks five miles away were "subject to Appellee's control". Not one shred of evidence supports this finding. The record shows that during the entire period covered by testimony every car which Appellant took to Empire was loaded with freight and returned to Appellee for transportation of such freight. If as the result of past arrangements the storage tracks at Empire were railroad storage facilities used to relieve congestion certainly at some time Appellee would have exercised dominion over the cars stored and evidence would have been produced showing the exercise of control by Appellee over the cars at Empire. The Court's finding that the cars at Empire were "subject to Appellee's control" must be based on an argument that there was nothing to keep Appellee from requesting the return of the cars. Such argument is pure supposition. The fact is that no cars were ever returned except in the Appellant's service—loaded with Appellant's freight. This purely speculative finding is without any support in the record.

## IV.

**THE COURT ERRED IN HOLDING THAT IT WOULD BE INEQUITABLE TO HOLD APPELLANT LIABLE FOR THE DEMURRAGE CHARGES SOUGHT AND THAT, IF THE TARIFFS WERE APPLICABLE, THEN SUCH TARIFFS WERE OF QUESTIONABLE VALIDITY.**

The Court's final argument in support of its judgment is that any other result would be inequitable and that if the tariffs were applicable then they would be of questionable invalidity. The inequity is said to lie in the fact that holding the tariff applicable would result in Appellant having to pay for a service rendered by Appellant to Appellee. Such holding, of course, presupposes that the taking and holding was for Appellee's benefit. Under the finding of the trial Court, which is not "clearly erroneous", no such inequity exists. Actually, the so-called equities of the case have no bearing on the question of the application of tariff provisions. If a tariff provision results in inequities or is illegal the remedy is provided by the Interstate Commerce Act and the matter must be presented to the Interstate Commerce Commission—a Court cannot grant relief. As was said by the Supreme Court in *Davis v. Portland Seed Co.,* 264 U.S. 403 at 425:

> "The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rate specified."

In connection with this phase of the Court's Opinion it is rather surprising to find the Court citing and relying on *Indiana Harbor Belt R. Co. v. Jacob Stern & Sons,* 37 F. Supp. 690. This case stands completely alone and has never before been cited or followed by any court. It is contrary to Supreme Court decisions in holding that a

tariff provision may be held unreasonable or otherwise unlawful in a court proceeding. The principles adopted by the court in the *Indiana Harbor Belt Case* resulted in a holding that the tariff provisions involved were unlawful and unenforceable despite the fact that such provisions had long before been upheld as reasonable and lawful by the Interstate Commerce Commission in *International Agricultural Corp. v. A. & W.P.R. Co.*, 93 I.C.C. 189. In reaching its conclusion the *Indiana Harbor Belt Case* relied on an Interstate Commerce Commission decision which had been modified by such body in the above case. The question involved in the *Indiana Harbor Belt Case* was not new but had previously been before both the Courts and the Commission and in each of such prior cases the principles and arguments adopted by the Court in the *Indiana Harbor Belt Case* had been considered and rejected. See *Procter & Gamble Co. v. C.H. & D. Ry. Co.*, 19 I.C.C. 556; *Procter & Gamble Co. v. United States*, 188 Fed. 221 (reversed on other grounds 243 U.S. 281); *Pittsburgh, C.C. & St.L. Ry. Co. v. Freedom Oil Works*, 247 Fed. 573; *National Refining Co. v. St. L. & I.M. & S. Ry. Co.* (C.C.A. 6), 237 Fed. 347.

Dated, San Francisco, California,
September 22, 1950.

Respectfully submitted,
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